

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 23700-1-III
)	
Respondent,)	
)	
v.)	Division Three
)	
GEORGE JOSHUA YOUNG,)	
)	
Appellant.)	UNPUBLISHED OPINION

KULIK, J. — Trooper Dean Burt stopped George Young’s vehicle for speeding. Mr. Young was riding as a passenger and Jerrod Wisher was driving. Both men had suspended licenses in the third degree. Trooper Burt impounded the vehicle. An inventory search of the vehicle prior to impoundment uncovered heroin and used drug paraphernalia. Mr. Young was convicted of possession of heroin and possession of drug paraphernalia. On appeal, Mr. Young contends the warrantless search of his vehicle was unlawful because the statute upon which the arrest was made was declared unconstitutional, and there was no exemption to the search warrant requirement. We conclude the search prior to impoundment was lawful, and affirm Mr. Young’s convictions.

FACTS

On April 3, 2004, Trooper Burt of the Washington State Patrol (WSP) stopped Mr. Young's car for speeding 83 miles per hour (mph) in a 70 mph zone. Jerrod Wisher was driving the car, and Mr. Young was a passenger.

Mr. Wisher gave Trooper Burt a Washington State driver's license. Trooper Burt ran a check through the Washington State Department of Licensing (DOL). DOL records showed Mr. Wisher's license was suspended in the third degree for failure to appear and unpaid tickets. Trooper Burt then checked Mr. Young's driver's license so the vehicle could be released to him. Mr. Young's license was also suspended in the third degree for refusing a breath/blood test, canceled insurance, reckless driving, failure to appear, and unpaid tickets.

At the time, the WSP's policy allowed officers to impound vehicles at their discretion. Trooper Burt concluded that the vehicle should be impounded to protect the property interests of the WSP and because he was concerned that the men would return to the vehicle and drive it away.

Initially, Trooper Burt intended to transport the two men from the scene, but not to book them into jail. Historically, the WSP did not book persons charged with third degree Driving While License Suspended (DWLS) into jail. Because Trooper Burt was

driving a vehicle without a shield in the back, he requested a trooper in a marked car to transport Mr. Wisher and Mr. Young. Trooper Burt also ordered a tow truck to impound the vehicle.

Trooper Carmen Herrington arrived on the scene, and secured the two men for transport by conducting a pat down search. During the pat down search, Trooper Herrington observed fresh needle marks on Mr. Young's arm. Trooper Herrington also conducted an inventory search of the vehicle. She found used drug paraphernalia and heroin in a backpack belonging to Mr. Young.

The State filed an information charging Mr. Young with possession of heroin and possession of used drug paraphernalia. A CrR 3.6 hearing was conducted and the court entered findings and conclusions denying Mr. Young's motion to suppress. The trial court concluded that (1) there was probable cause to arrest Mr. Young for DWLS in the third degree; (2) the inventory search was valid; and (3) there was no police misconduct. The court denied Mr. Young's motion for reconsideration.

Mr. Young's case was submitted to the court on stipulated facts. The court entered a memorandum decision finding Mr. Young guilty of the two charges against him. Mr. Young appeals.

ANALYSIS

Mr. Young contends the search of his vehicle was unlawful. Warrantless searches are per se unreasonable unless they fall within narrowly drawn exceptions. *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001). Washington allows police to conduct a warrantless inventory following the lawful impoundment of a vehicle. *State v. Greenway*, 15 Wn. App. 216, 218, 547 P.2d 1231 (1976). Impoundment may be authorized by statute, ordinance, or common law. *See, e.g.*, RCW 46.55.113; *State v. Singleton*, 9 Wn. App. 327, 331, 511 P.2d 1396 (1973). In the absence of authorization under a statute or ordinance, there must be a showing of reasonable cause for the impoundment. *Id.*

Impoundment of a vehicle is justified: (1) as evidence of a crime, if the officer has probable cause to believe the vehicle was stolen or used in the commission of a felony; (2) as part of the police community caretaking function if removal is necessary to address traffic or public safety concerns, or to prevent vandalism; (3) as part of police enforcement of traffic regulations if the driver has committed a traffic offense for which impoundment is authorized. *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980). Police are also justified in impounding a vehicle when there are no reasonable alternatives. *State v. Hardman*, 17 Wn. App. 910, 912, 567 P.2d 238 (1977).

Mr. Young was initially arrested for violating the DWLS statute, RCW 46.20.342.

RCW 46.20.342 is one of the traffic offenses where impoundment is authorized under RCW 46.55.113. Trooper Burt had the authority to arrest Mr. Young pursuant to RCW 10.31.100(3)(e). Trooper Burt also had the authority to impound Mr. Young's car under RCW 46.55.113, as part of the enforcement of traffic regulations. It follows then that the impoundment of Mr. Young's vehicle was lawful.

The impoundment here was also reasonable. The court found that:

. . . .

3. Either of Trooper Burt's reasons for the impound were reasonable:
 - a. Concern for the safety of the vehicle's contents; or
 - b. That the driver or defendant could return and drive the vehicle away.
4. The fact that the owner of the vehicle was not given the option to waive impoundment was offset by the concern that one of the two occupants of the vehicle would return and drive the vehicle away.
5. The impound of the vehicle was reasonable.

Clerk's Papers at 51.

Moreover, Trooper Burt's decision to impound the vehicle was consistent with the legislative policy behind the authorization of the impoundment of vehicles operated by drivers with suspended licenses. The goal of this legislation is to (1) prevent the continuation of the driving offense; (2) protect public safety; and (3) provide a means of accountability for registered drivers who allow persons with suspended or revoked

licenses to operate their vehicles. *In re Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 157-58, 60 P.3d 53 (2002). Lastly, Trooper Burt's decision was consistent with the Washington State Patrol impound policy.

Relying on *State v. McKenna*, 91 Wn. App. 554, 958 P.2d 1017 (1998), Mr. Young suggests the impoundment of his vehicle was unlawful because there was no valid custodial arrest. *McKenna* examines the search incident to arrest exception to the warrant requirement. In contrast, here the court considered the impoundment exception to the warrant requirement, not a search incident to arrest.

Mr. Young next contends the impoundment was unlawful because the arrest was unlawful. Relying on *City of Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004), Mr. Young asserts the trooper lacked probable cause to arrest because the DWLS third degree statutes were declared unconstitutional in *Moore*. This argument is without merit.

In *Moore*, the Washington Supreme Court held that RCW 46.20.289 and RCW 46.20.324(1) were unconstitutional because they did not contain a provision for a hearing prior to the suspension of a driver's license. *Moore*, 151 Wn.2d at 677. The court did not hold RCW 46.20.342(1)(c) unconstitutional. This statute defines the crime of third degree DWLS. In other words, *Moore* did not conclude that the crime of third degree DWLS was unconstitutional, but, rather, invalidated two means for suspending a driver's

license.

Mr. Young was arrested on April 3, 2004; the *Moore* opinion was issued on June 3, 2004. Even if we assume that Mr. Young's arrest for third degree DWLS was based on a suspension method found unconstitutional, his arrest was still valid. *See State v. Carnahan*, 130 Wn. App. 159, 164-65, 122 P.3d 187 (2005). Generally, an arrest based on probable cause is valid even though the arrest is predicated on a statute that is subsequently found unconstitutional. *See State v. White*, 97 Wn.2d 92, 103, 640 P.2d 1061 (1982). In short, Mr. Young's argument that the inventory search here was not based on a lawful arrest fails.

Lastly, Mr. Young argues that the impoundment of his vehicle was unreasonable because Trooper Burt was required to offer the occupants of the vehicle waiver of impoundment before exercising his discretion to impound the vehicle.

There is no support for this argument in the statute or the case law. RCW 46.55.113(1) provides that when a driver is arrested under RCW 46.20.342, the vehicle is "subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer." A mandatory requirement that officers must first offer waiver of impoundment to the occupants of the vehicle is contrary to the statute and impermissibly restricts the ability of

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law enforcement officers to protect the public and enforce traffic regulations.

We affirm Mr. Young's convictions.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, J.

WE CONCUR:

Sweeney, C.J.

Kato, J.